

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2000

4 (Argued: October 23, 2000 Decided: August 03, 2001 )

5 Docket No. 00-6077

6 - - - - -  
7 JOHN BRENNAN; JAMES G. AHEARN; KURT BRUNKHORST,

8  
9 Intervenors-Appellants,

10  
11  
12 - v. -

13  
14  
15 N.Y.C. BOARD OF EDUCATION; DEPARTMENT OF CITYWIDE ADMINISTRATIVE  
16 SERVICES; WILLIAM J. DIAMOND, Personnel Director, New York City  
17 Department of Personnel (in his official capacity); 115-13 120th  
18 Street,

19  
20 Defendants-Appellees,

21  
22  
23 UNITED STATES OF AMERICA,

24  
25 Plaintiff-Appellee.

26  
27 - - - - -  
28  
29 B e f o r e: CARDAMONE, WINTER, and POOLER, Circuit Judges.

30  
31 Appeal from the denial of a motion to intervene by the United  
32 States District Court for the Eastern District of New York (Robert M.  
33 Levy, Magistrate Judge). We hold that the proposed intervenors --  
34 white, male employees whose employment status would be negatively  
35 affected by the terms of a race/ethnicity/gender-conscious settlement  
36 agreement reached between the United States and the New York City  
37 Board of Education -- have an interest cognizable under Fed. R. Civ.

1 P.

2 24(a)(2). We therefore vacate and remand for further proceedings.

3 MICHAEL E. ROSMAN, Center for Individual  
4 Rights, Washington, D.C. (George W.C.  
5 McCarter, McCarter & Higgins, Shrewsbury,  
6 New Jersey, of counsel), for Intervenor-  
7 Appellants.  
8

9 ALAN BECKOFF (Michael D. Hess, Corporation  
10 Counsel of the City of New York, and  
11 Stephen J. McGrath, of counsel), New York,  
12 New York, for Defendants-Appellees.  
13

14 LISA WILSON EDWARDS, United States  
15 Department of Justice, Civil Rights  
16 Division (Bill Lann Lee, Acting Assistant  
17 Attorney General, and Dennis J. Dimsey, of  
18 counsel), Washington, D.C., for Plaintiff-  
19 Appellee.  
20

21 WINTER, Circuit Judge:

22 John Brennan, James G. Ahearn, and Kurt Brunkhorst appeal from  
23 Magistrate Judge Levy's denial of their motion to intervene as of  
24 right, pursuant to Fed. R. Civ. P. 24(a)(2). See United States v.  
25 New York City Bd. of Educ., 85 F. Supp. 2d 130, 154-56 (E.D.N.Y.  
26 2000). The underlying action was brought by the United States  
27 against the New York City Board of Education and certain City  
28 officials (collectively "Board"). The complaint alleged employment  
29 discrimination. The parties -- the government and the Board --  
30 reached a settlement agreement ("Agreement") and moved for a fairness  
31 hearing and approval in the district court. The Agreement contained  
32 provisions that conferred certain employment rights on a number of

1 persons who are African-American, Hispanic, Asian, or female.  
2 Appellants, white, male employees of the Board, sought to intervene.  
3 They claimed that intervention was necessary to protect their present  
4 employment status -- in particular, their seniority rights. The  
5 district court denied the intervention motion on the ground that  
6 appellants could not assert a cognizable interest under Rule 24(a)(2)  
7 because they had presumptively obtained their employment status as a  
8 result of discrimination, they had no property right in that status,  
9 and any adverse effect of the Agreement was remote and speculative.  
10 See id. at 155-56. We disagree and reverse.

#### 11 BACKGROUND

12 In bringing the underlying action pursuant to Section 707(a) of  
13 Title VII, 42 U.S.C. § 2000e-6(a), the government alleged a pattern  
14 and practice of racial and gender discrimination by the Board in its  
15 hiring and recruitment practices with respect to the positions of  
16 Custodian and Custodian Engineer. These positions appear to have a  
17 hierarchical relationship, with Custodian Engineer being the superior  
18 job.<sup>1</sup> Before one becomes a permanent Custodian or Custodian Engineer  
19 with seniority rankings, one must serve what is essentially a  
20 probationary period as a provisional Custodian or provisional  
21 Custodian Engineer.

22 The complaint alleged, inter alia, that the Board engaged in  
23 discrimination by: (i) failing to recruit females and minorities on

1 the same basis as white males; (ii) failing to hire and promote  
2 minorities on the same basis as whites; and (iii) using civil service  
3 exams -- which determine the order of hiring and promotion and,  
4 therefore, seniority -- that had a negative, disparate impact on  
5 black and Hispanic applicants.

6 After discovery and negotiations, the government and the Board  
7 executed the Agreement. In pertinent part, the Agreement required  
8 the Board to confer permanent civil service status on forty-three  
9 provisional African-American, Hispanic, Asian, and female Custodians  
10 and Custodian Engineers, and to provide retroactive seniority to them  
11 and an additional eleven employees (fifty-four in all) of similar  
12 backgrounds (collectively "Offerees").

13 The Agreement would benefit the Offerees in the following ways.  
14 The salary of a Custodian or Custodian Engineer is discounted at  
15 various levels during the first five years of an individual's  
16 employment. Retroactive seniority would entitle an Offeree to a  
17 higher salary, i.e., a smaller discount. Moreover, the larger the  
18 building in which a Custodian or Custodian Engineer works, the higher  
19 the salary. As a result of a collective bargaining agreement,  
20 transfers to larger buildings are based generally on a formula that  
21 uses both seniority and performance ratings. In practice, 90% of  
22 actual transfers are based on the transferee's seniority. Finally,  
23 permanent civil service status benefits an Offeree by allowing

1 him/her to bypass provisional status in which the employee has no  
2 protected rights.

3 As claimed by appellants, the pertinent principal effects of  
4 the Agreement on other employees appear to be two-fold. First, other  
5 Custodians or Custodian Engineers will have less seniority relative  
6 to Offerees moved above them and may therefore fail to obtain a  
7 desired transfer to a larger building. Second, permanent Custodian  
8 Engineers have seniority rights whereas provisional Custodian  
9 Engineers are probationary employees.<sup>2</sup> According permanent status as  
10 a Custodian Engineer to an Offeree may result in the Offeree's  
11 displacing a provisional Custodian Engineer, who may return to a  
12 permanent Custodian position.

13 The parties moved the district court to hold a fairness hearing  
14 at which objections to the Agreement would be heard. See 42 U.S.C. §  
15 2000e-2(n) (preventing challenge to employment practices implementing  
16 consent judgment provided notice and opportunity to object are  
17 given). Various employees, including appellants, filed objections to  
18 the proposed Agreement on numerous grounds. Appellants, who were  
19 permanent Custodians and/or provisional Custodian Engineers, also  
20 moved to intervene as of right, pursuant to Fed. R. Civ. P.  
21 24(a)(2),<sup>3</sup> on the ground that the Agreement was unconstitutional.  
22 They claimed that the Agreement was impermissibly based on race,  
23 ethnicity, and gender and would result in some or all of them losing

1 their status as provisional Custodian Engineers and/or their relative  
2 seniority rights as Custodians and/or Custodian Engineers. The  
3 district judge referred the matter to Magistrate Levy to conduct a  
4 fairness hearing, and the government and the Board then consented to  
5 have the case referred to Magistrate Levy for all purposes, pursuant  
6 to 28 U.S.C. § 636(c).

7 Magistrate Levy received expert declarations and held a  
8 fairness hearing, at which employees of the Board who filed timely  
9 objections to the Agreement had an opportunity to raise their  
10 concerns, while the government and the Board presented arguments in  
11 favor of entry of the Agreement.

12 The district court found that the government had made a prima  
13 facie showing on each of its discrimination claims; that the remedies  
14 proposed in the Agreement were fair, reasonable, and legal; and that  
15 none of the objections had sufficient merit to overcome the  
16 "presumption of validity" that the district court accorded to the  
17 Agreement. 85 F. Supp. 2d at 157.

18 The district court also denied appellants' motion to intervene.  
19 It reasoned that they had presumptively obtained their seniority  
20 rights as a result of discrimination. It further concluded that  
21 appellants had no legally protectable interest in their employment  
22 status or seniority rankings. Specifically, the district court held  
23 that "a civil servant has no vested property right in a particular

1 position or appointment, and 'a person on an eligibility list does  
2 not possess any mandated right to appointment or any other legally  
3 protectible interest.'" 85 F. Supp. 2d at 155 (quoting Kirkland v.  
4 New York State Dep't of Corr. Servs., 711 F.2d 1117, 1134 (2d Cir.  
5 1983) (internal quotation marks omitted)).

6 The district court further held that "[e]ven if the proposed  
7 intervenors could assert some cognizable interest in their seniority  
8 rights, that interest would be remote and speculative." Id. at 156.  
9 It based this conclusion on the perceived unlikelihood that any of  
10 the fifty-four Offerees would compete with any of the appellants for  
11 a transfer to a particular building and obtain the transfer as a  
12 result of the retroactive seniority. For such a result to occur, the  
13 court reasoned, several events would need to converge: (i) one of  
14 the Offerees and one of the appellants would have to request the same  
15 transfer; (ii) each would have to have the same job title (i.e.,  
16 Custodian or Custodian Engineer); (iii) the performance ratings of  
17 the Offeree and the appellant would have to be quite close; and (iv)  
18 the Offeree and the appellant would have to hold the first and second  
19 spots, respectively, on the transfer list for the particular  
20 building. The district court held, therefore, that appellants'  
21 interest in their seniority rankings was not "direct, substantial,  
22 and legally protectable," id. at 156 (internal quotation marks  
23 omitted), denied appellants' motion to intervene, and approved the

1 Agreement.

2 This appeal followed.

3 DISCUSSION

4 "We review the denial of . . . the motion for intervention as  
5 of right under Fed. R. Civ. P. 24(a) . . . for abuse of discretion."  
6 New York News, Inc. v. Kheel, 972 F.2d 482, 485 (2d Cir. 1992);  
7 accord United States v. Glens Falls Newspapers, Inc., 160 F.3d 853,  
8 854 (2d Cir. 1998) ("We have jurisdiction of an appeal from an order  
9 which denies intervention. Our review invokes the abuse of  
10 discretion standard." (internal citations omitted)). "Errors of law  
11 or fact may constitute such abuse." SG Cowen Sec. Corp. v. Messih,  
12 224 F.3d 79, 81 (2d Cir. 2000).

13 To intervene as of right, a movant must: "(1) timely file an  
14 application, (2) show an interest in the action, (3) demonstrate that  
15 the interest may be impaired by the disposition of the action, and  
16 (4) show that the interest is not protected adequately by the parties  
17 to the action." Kheel, 972 F.2d at 485. The timeliness of  
18 appellants' motion to intervene is not questioned.

19 Turning to the nature of appellants' interest in the underlying  
20 action, we have stated that, for an interest to be cognizable under  
21 Rule 24(a)(2), it must be "direct, substantial, and legally  
22 protectable." Washington Elec. Coop., Inc. v. Massachusetts Mun.  
23 Wholesale Elec. Co., 922 F.2d 92, 97 (2d Cir. 1990); accord Donaldson



1 v. United States, 400 U.S. 517, 531 (1971) (requiring "significantly  
2 protectable interest"), superceded by statute on other grounds as  
3 stated in United States v. New York Tel. Co., 644 F.2d 953, 956 (2d  
4 Cir. 1981); Kheel, 972 F.2d at 486; Restor-A-Dent Dental Labs., Inc.  
5 v. Certified Alloy Prods., Inc., 725 F.2d 871, 874 (2d Cir. 1984)  
6 ("[S]uch an interest must be direct, as opposed to remote or  
7 contingent."). "An interest that is remote from the subject matter  
8 of the proceeding, or that is contingent upon the occurrence of a  
9 sequence of events before it becomes colorable, will not satisfy the  
10 rule." Washington Elec., 922 F.2d at 97.

11 Appellants assert that they have a cognizable interest both in  
12 their status as provisional Custodian Engineers and in their  
13 contractual seniority rights as Custodians and Custodian Engineers.  
14 Because permanent Custodian Engineers have seniority over provisional  
15 Custodian Engineers, the former may replace the latter at any time.  
16 Appellants claim that, on the one hand, were they to be replaced as  
17 Custodian Engineers and returned to their positions as Custodians,  
18 they would have reduced seniority relative to the Custodian Offerees  
19 as a result of the Agreement. On the other hand, if they remained  
20 provisional Custodian Engineers and achieved permanent status in that  
21 position, they would have less seniority than the Offerees who became  
22 permanent Custodian Engineers with retroactive seniority.

23 As noted, the district court held that appellants' interests

1 were not cognizable under Rule 24(a)(2) because: (i) their seniority  
2 rights and employment status relative to the Offerees had  
3 presumptively been obtained as a result of illegal discrimination;  
4 (ii) they had no property or other legally protectable interest in  
5 their status as provisional Custodian Engineers or seniority as  
6 Custodians; and (iii) their interest in their seniority rights was  
7 too remote and speculative to support intervention under Rule  
8 24(a)(2). We disagree and address each rationale in turn.

9 With regard to whether appellants lack a cognizable interest in  
10 their employment status and seniority rights because these benefits  
11 were presumptively obtained as the result of discriminatory  
12 practices, we believe that the district court's ruling put the cart  
13 before the horse. As we have stated,

14 [E]xcept for allegations frivolous on their  
15 face, an application to intervene cannot be  
16 resolved by reference to the ultimate merits of  
17 the claims which the intervenor wishes to  
18 assert following intervention, but rather turns  
19 on whether the applicant has demonstrated that  
20 its application is timely, that it has an  
21 interest in the subject of the action, that  
22 disposition of the action might as a practical  
23 matter impair its interest, and that  
24 representation by existing parties would not  
25 adequately protect that interest.  
26

27 Oneida Indian Nation v. New York, 732 F.2d 261, 265 (2d Cir. 1984) (internal

28 citation omitted). Thus, while the presumption of validity of a  
29 settlement agreement may shift the burden of showing invalidity to

1 non-party objectors, it carries no weight in the determination of  
2 whether an interest is sufficient for intervention under Rule 24(a).  
3 See generally Kirkland, 711 F.2d at 1126-28. The sufficiency of an  
4 interest entitles the intervenor to contest the merits of his/her  
5 claim based on that interest. An interest that is otherwise  
6 sufficient under Rule 24(a)(2) does not become insufficient because  
7 the court deems the claim to be legally or factually weak. In the  
8 present case, it is precisely the existence or non-existence of prior  
9 discrimination and its relationship to appellants' present status  
10 that they want to contest by intervening as parties. The merits can,  
11 therefore, be resolved only after appellants have an opportunity for  
12 discovery and the presentation of evidence as a party to the action.<sup>4</sup>

13  
14 We turn now to appellees' argument that denial of intervention  
15 was proper because of appellants' lack of a property or other legally  
16 protectable interest in their employment status. Initially, we  
17 address this claim with respect to appellants' status as provisional  
18 Custodian Engineers and thereafter discuss it in the context of their  
19 seniority rights. Under New York law, appellants have no property or  
20 other protectable legal interest in their status as provisional  
21 Custodian Engineers. See Meyers v. City of New York, 622 N.Y.S.2d  
22 529, 532 (2d Dep't 1995) ("It is well settled that a probationary  
23 employee, unlike a permanent employee, has no property rights in his

1 position . . . ."); see also York v. McGuire, 63 N.Y.2d 760, 761  
2 (1984). However, Rule 24(a)(2) "does not require that the intervenor  
3 prove a property right, whether in the constitutional or any other  
4 sense." United States v. City of Chicago, 870 F.2d 1256, 1260 (7th  
5 Cir. 1989). Indeed, New York Public Interest Research Group, Inc. v.  
6 Regents of the University of the State of New York, 516 F.2d 350,  
7 351-52 (2d Cir. 1975) (per curiam), held that the Pharmaceutical  
8 Society of the State of New York, Inc. and three individual  
9 pharmacists had standing to intervene as of right in an action  
10 challenging the legality of a regulation prohibiting advertising the  
11 price of prescription drugs, even though the interest asserted -- the  
12 economic interest of pharmacists in sustaining the regulation --  
13 clearly did not constitute a property right.

14 Rule 24(a)(2) requires not a property interest but, rather, "an  
15 interest relating to the property or transaction which is the subject  
16 of the action." Appellants have such an interest in the Agreement.  
17 Appellants are asserting claims that are the mirror image of the  
18 claims asserted by the government. The government alleges that  
19 race/ethnicity/gender discrimination prevented the Offerees from  
20 obtaining positions as permanent Custodians and Custodian Engineers  
21 and that the remedy provided by the Agreement merely restores them to  
22 positions they would have held but for such discrimination.  
23 Appellants claim the race/ethnicity/gender-conscious remedy is not

1 justified by any demonstrated past discrimination and that their loss  
2 of relative seniority as a result of the Agreement is itself  
3 impermissible discrimination.

4 The claims asserted by the government and appellants,  
5 therefore, are based on identical legal theories, the difference  
6 between them being entirely in the issue of whether the remedy  
7 restores circumstances that would have existed but for discrimination  
8 or is itself discrimination. Whether appellants or the Offerees have  
9 a property right in the position of provisional Custodian Engineer  
10 simply has nothing to do with that issue from either point of view.  
11 While it is the case that a provisional Custodian Engineer might not  
12 be entitled to procedural due process in a termination proceeding  
13 based on poor performance because of a lack of a property interest,  
14 see Meyers, 622 N.Y.S.2d at 532, an adverse employment action based  
15 on race, ethnicity, or gender is clearly illegal. To hold otherwise  
16 would require civil rights plaintiffs generally to show a property  
17 interest in the position in question. We note that we have held in  
18 the past that, where a proposed intervenor's interests are otherwise  
19 unrepresented in an action, the standard for intervention is no more  
20 burdensome than the standing requirement, see United States Postal  
21 Serv. v. Brennan, 579 F.2d 188, 190 (2d Cir. 1978), and that  
22 appellants' interest in the underlying action and the Agreement is  
23 for purposes of standing identical to that of the Offerees.

1       The preceding discussion is of course equally applicable to  
2 appellants' seniority rights as both Custodians and Custodian  
3 Engineers, but we note also that seniority rights are for many  
4 purposes legally cognizable rights. "Seniority is a contractual  
5 right, and a competitive seniority system establishes a hierarchy of  
6 such rights according to which various employment benefits are  
7 distributed." Lorance v. AT & T Techs., Inc., 490 U.S. 900, 905  
8 (1989) (internal quotation marks, citations, emphasis, and  
9 alterations omitted), superceded by statute on other grounds as  
10 stated in Landgraf v. USI Film Prods., 511 U.S. 244, 251 (1994).  
11 Appellants, therefore, have "an interest relating to the  
12 [Agreement]."

13       Finally, we turn to the district court's conclusion that, even  
14 if appellants could assert an interest in seniority rights that  
15 otherwise would be cognizable under Rule 24(a)(2), it would be too  
16 "remote and speculative" to permit intervention as of right, chiefly  
17 because of the alleged unlikelihood of a confluence of events  
18 resulting in the foreclosure of an appellant by an Offeree for a  
19 building transfer. 85 F. Supp. 2d at 156. We again disagree.

20       We agree with the caselaw in numerous other circuits holding  
21 that the kind of interest asserted by appellants here is cognizable  
22 under Rule 24(a)(2). See, e.g., United States v. City of Hialeah,  
23 140 F.3d 968, 982 (11th Cir. 1998) ("[T]he retroactive seniority

1 provision's threat to the objectors' competitive seniority benefits  
2 prevented entry of the consent decree. The objectors were not  
3 required to prove with certainty that particular employees would lose  
4 contractual benefits."); Edwards v. City of Houston, 78 F.3d 983,  
5 1004 (5th Cir. 1996) (en banc) (holding interest in equal access to  
6 promotion system and promotion opportunities justifies intervention);  
7 Thomas v. Bakery, Confectionery & Tobacco Workers Int'l Union, 982  
8 F.2d 1215, 1220 (8th Cir. 1992) ("The Metz employees' seniority  
9 rights were not in issue [during the liability phase of the trial]. .  
10 . . The intervenors had a substantial interest in the remedy phase  
11 of the trial, however, since a decision to reinstate the plaintiffs,  
12 dove-tail them with the Metz employees, or end-tail the Metz  
13 employees would substantially affect their rights."); Dawson v.  
14 Pastrick, 600 F.2d 70, 75 (7th Cir. 1979) ("The union in this case  
15 was allowed to intervene to protect the interests of majority  
16 firefighters in their promotional seniority rights. . . . Although .  
17 . . no majority fireman has as yet been denied a promotion because of  
18 the court's decree, the remedy granted makes such an event a distinct  
19 possibility."); Stallworth v. Monsanto Co., 558 F.2d 257, 268-69 (5th  
20 Cir. 1977) (holding that if, on remand, it was shown that employees  
21 had contractual relationship that covered seniority rights, interest  
22 requirement of Fed. R. Civ. P. 24(a)(2) would be satisfied). But cf.  
23 Dilks v. Aloha Airlines, Inc., 642 F.2d 1155, 1157 (9th Cir. 1981)

1 (per curiam).

2       There is good reason for the existence of this body of caselaw.  
3 The district court focused solely on the question of whether any  
4 appellant would lose a building transfer directly to one of the  
5 Offerees. That is not the proper focus, however, because the  
6 exercise of seniority rights has a domino effect. If an Offeree  
7 obtains a desirable transfer, all comparable employees with more  
8 seniority than an appellant but less than that of the Offeree may  
9 seek transfers at the next level of desirability, thereby foreclosing  
10 the particular appellant. The effects of the loss of relative  
11 seniority are not easily forecast and may not even be perceived as  
12 they happen. To take an alphabetical example, if employee Z is moved up to just above  
13 employee A, then the effects of that move on employee T will turn on the preferences of employees A  
14 through S. Where transfers among buildings are concerned, size (and therefore salary) will be  
15 important in determining whether an employee will exercise seniority to seek a transfer, but some  
16 employees will also be motivated by other factors, such as location. If employee Z secures a transfer, a  
17 chain reaction will begin with various openings and transfers occurring based on a variety of decisions  
18 by A through S. After all is played out, employee T may well find it impossible to reconstruct what  
19 transfer might have been available to him/her but for the moving-up of employee Z.

20       An appellant's loss of a desirable transfer need not be directly to an Offeree, therefore, for the  
21 loss to be the result of the Agreement. That being the case, the effects of a loss  
22 of relative seniority rights should not be regarded as too



1 speculative and remote to justify intervention<sup>5</sup> save, perhaps, in a  
2 case where a concrete effect on an employee is impossible. That is  
3 clearly not the case here.

4 Similarly, appellants' interest in the diminution of their  
5 seniority rights is not "remote" from the subject matter of this  
6 action and would not "inject collateral issues." Kheel, 972 F.2d at  
7 486 (internal quotation marks omitted). Here, the loss of  
8 appellants' relative seniority rights -- ineluctably the result of  
9 the proposed Agreement -- is central, rather than collateral, to the  
10 Agreement.

11 Appellants have thus satisfied the second requirement for  
12 intervention under Rule 24(a)(2). For the same reasons, appellants have also  
13 adequately "demonstrate[d] that the interest may be impaired by the  
14 disposition of the action," Kheel, 972 F.2d at 485, the third  
15 requirement.

16 With regard to the last requirement of Rule 24(a)(2) -- a  
17 showing "that the interest is not protected adequately by the parties  
18 to the action," Kheel, 972 F.2d at 485 -- the Board argues that its  
19 presence as a party adequately represented appellants' interests. We  
20 disagree. The test here is not whether the Board did well on behalf  
21 of appellants -- an inquiry that would require exploration of the  
22 merits -- but whether the Board's interests were so similar to those  
23 of appellants that adequacy of representation was assured. See

1 Washington Elec., 922 F.2d at 98. We find no such congruence of  
2 interests here. In litigation such as the present case, an employer  
3 may have an interest in defending its hiring and other practices or  
4 in retaining certain incumbents in their jobs. However, it may have  
5 an equally strong or stronger interest in bringing such litigation to  
6 an end by settlements involving the displacement of employees who are  
7 not parties to the action. The employer may, in short, behave like a  
8 stakeholder rather than an advocate. Indeed, in the present case it  
9 appears that the entire burden of the settlement -- there is no back  
10 pay award to the Offerees -- is upon individuals like appellants.

11 Appellants are, therefore, to be granted intervention. They should be accorded discovery and  
12 other rights with regard to their claim that any impairment by the Agreement of their interests in their  
13 positions as provisional Custodian Engineers and in their seniority rights as Custodians and Custodian  
14 Engineers would constitute impermissible discrimination rather than a proper restorative remedy based  
15 on past discrimination against the Offerees.

16 Appellants also ask us to exercise discretionary jurisdiction and rule on the merits of the  
17 Agreement, rather than remand the case to the district court. See Kaplan v. Rand, 192 F.3d 60, 67  
18 (2d Cir. 1999) ("Although the general rule is that only a party of record may appeal a judgment, a  
19 nonparty may appeal when the nonparty has an interest that is affected by the trial court's judgment"  
20 (internal quotation marks omitted)). We think such a course would be ill-advised.

21 Appellants have argued convincingly that they were denied the opportunity to develop a record  
22 that would have permitted a full and appropriate ruling on the fairness and constitutionality of the

Agreement. Given the heavily factual nature of these issues, we believe that the best course is to remand the case to allow for a full development of the record.

## CONCLUSION

We therefore vacate the order denying the motion to intervene and approving the Agreement and remand with instructions to the district court to permit appellants to intervene.

## FOOTNOTES

1. The record is unclear as to whether there is some formal or informal progression from a Custodian position to a Custodian Engineer position. This issue is not dispositive at this stage of the proceedings and can be clarified on remand.
2. It is unclear from the record whether provisional Custodian Engineers also have seniority rights. In any event, probationary employees would always have less seniority than permanent employees.
3. “Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.” Fed. R. Civ. P. 24(a)(2).
4. As noted, in approving the settlement, the Magistrate Judge relied upon evidentiary submissions, including two expert declarations that it described as not only unrebutted but also unchallenged. However, appellants have had no opportunity to take discovery, including the depositions of the experts. We also note that at least one reason the declarations were unrebutted and unchallenged was that they were served some weeks after objections were due and only days before the fairness hearing. In fact, one declaration was sent to the court via Federal Express only two days before the hearing.

5. In response to a question at oral argument, counsel for the government argued that if an appellant were in the future to lose a desired transfer, that appellant might challenge the legality of the Agreement at that time. In a post-argument letter, the government withdrew from that position.